(1) Supreme Court, U.S.
FILED

No. 95-

95-965 DEC 18 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STANLEY R. STERN,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a defendant be convicted of violating the money laundering statute, 18 U.S.C. § 1956, absent proof that the defendant had actual knowledge of the fact that the laundered funds came from unlawful activity, but where the defendant was allegedly "willfully blind" to the possibility that the funds came from "some form" of unlawful activity?

2. Should a defendant be convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 for arranging for checks to be cashed without the filing of Currency Transaction Reports, absent proof (1) that the defendant knew that under the particular circumstances, the filing of such reports was required by law, and (2) that the defendant specifically intended to violate that law?

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Stanley R. Stern petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit affirming the Judgment of conviction entered in the United States District Court for the Middle District of Florida.

OPINION BELOW

The summary order of affirmance of the Court of Appeals (App. 1a) and the District Court's opinion denying Petitioner's motion for bail pending appeal (App. 3a) are unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on September 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the District Court was based on 18 U.S.C. § 3231.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1956(a)(1) provides, in pertinent part, as follows:

> "(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> * * * *
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;
>
> * * * *
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both."

STATEMENT

This case raises important and unsettled issues involving the proper construction and application of Federal laws governing money laundering and currency reporting. The fol-

lowing is a brief summary of the factual background of this case.

1. Prior to this case, Petitioner was an attorney practicing primarily in the fields of collection and bankruptcy work. The case arises out of certain of Petitioner's dealings with one of his clients, Anthony DiStefano.

According to the prosecution's evidence, DiStefano and various co-conspirators—not including Petitioner—engaged in a scheme to fleece a victim out of approximately $1.5 million. The Government contended that Petitioner committed various Federal offenses by assisting DiStefano in cashing checks derived from this fraud scheme without filing Currency Transaction Reports ("CTRs") with the Internal Revenue Service. The Government contended that Petitioner accomplished this by depositing checks received from DiStefano in his attorney's trust account, and by arranging for another client to deliver cash to DiStefano.

The Government did not contend that Petitioner participated in the fraud scheme perpetrated by DiStefano and his co-conspirators, or that Petitioner was even aware of the fact that this scheme was in existence. Nor did the Government offer any evidence of Petitioner's knowledge of the source of the money. All that the Government offered on the issue of Petitioner's knowledge as to the source of the funds was testimony by an FBI agent that Petitioner allegedly made an offhand comment while waiting to appear before the Grand Jury to the effect that Petitioner had suspected that the money might have had something to do with narcotics, which, of course, it did not.

2. A two-count indictment was returned against Petitioner in the United States District Court for the Middle District of Florida on November 9, 1993. Count One charged Petitioner with conspiring to defraud the United States in violation of 18 U.S.C. § 371 by agreeing to cash checks for DiStefano without the filing of CTRs. Count Two charged Petitioner with

money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) by knowingly engaging in a financial transaction involving the proceeds of "specified unlawful activity", *i.e.*, mail fraud, in order to conceal or disguise such proceeds.

The indictment was based on the theory that by depositing the checks from DiStefano in his trust account, and by arranging for another client to deliver cash to DiStefano, Petitioner acted as a *de facto* financial institution within the meaning of the Federal currency reporting statutes and regulations. Thus, the indictment charged that Petitioner himself had an obligation to file CTRs with respect to the transactions at issue, and that Petitioner allegedly engaged in a conspiracy to defraud the United States by conducting the transactions without filing CTRs.

3. Trial commenced on April 12, 1994. The District Court charged the jury, over the defense's objection, that the Government could carry its burden of proving the essential element of Petitioner's knowledge of the illegal origins of the funds involved in the transactions, by showing that Petitioner was "willfully blind" to the possibility that the funds came from criminal activity. The District Court charged the jury as follows:

> "When knowledge of the existence of a particular fact is an essential part of an offense, such knowledge may be established if the defendant is aware of a high probablity of its existence, unless he actually believes that it does not exist. . . . In other words, you may find that a defendant acted knowingly if you find beyond a reasonable doubt that either: One, the defendant actually knew that the money sent to his escrow accounts was the proceeds of some unlawful activity, or, two, that he deliberately closed his eyes to what he had every reason to believe was the fact."

The District Court also charged the jury that it could find that Stern constituted a *de facto* financial institution under the currency reporting statutes and regulations, 31 C.F.R. § 103.11(i), if the jury found that Petitioner acted as a currency dealer or exchanger "whether or not he did so on a regular basis or as an organized business concern." The District Court did not charge the jury that in order to convict, the jury also had to find that Petitioner knew that he constituted a "financial institution" under the statutes and regulations, or that he knew that he had an obligation to file CTRs under those provisions.

4. The jury returned guilty verdicts against Petitioner on both counts on April 18, 1994. On Ocotber 14, 1994, the District Court sentenced Petitioner to a term of sixty months' incarceration, to be followed by a three-year term of supervised release. The District Court also ordered restitution in the amount of $662,000. The District Court denied Petitioner's motion for bail pending appeal. (App. 3a)

The Court of Appeals affirmed Petitioner's conviction in a summary order entered on September 20, 1995. (App. 1a)

REASONS FOR GRANTING THE PETITION

This case raises important and unsettled issues regarding the proper scope and interpretation of the Federal money laundering and currency reporting statutes. Those statutes have become frequent bases for Federal prosecution in recent years. Conviction under these statutes carries extremely onerous penalties including substantial periods of incarceration and forfeiture, even in cases such as this where there is no connection between the alleged money laundering and narcotics trafficking. Moreover, this case poses particularly troublesome problems for a defendant, such as Petitioner, who was not involved in the underlying criminal activity giving rise to the laundered funds, and was not even aware of the

existence of that activity. This Court should grant review in order to address these issues.

I. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO DECIDE THE ISSUE OF WHETHER THE FEDERAL MONEY LAUNDERING STATUTE REQUIRES PROOF OF ACTUAL KNOWLEDGE OF THE ILLEGAL SOURCE OF THE LAUNDERED FUNDS.

The plain language of 18 U.S.C. § 1956(a)(1)(A) expressly states that a defendant may be convicted thereunder if the defendant engaged in a financial transaction involving the proceeds of specified unlawful activity "*knowing* that the property involved in the transaction represents the proceeds of some form of unlawful activity", and "*knowing* that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." A plain reading of the statute leads to the conclusion that in order to obtain a conviction, the Government must prove that the defendant had actual knowledge of the illegal origins of the funds; constructive knowledge does not suffice.

The United States Court of Appeals for the Second Circuit has stated that "the plain meaning of the statute" compels the conclusion that "18 U.S.C. § 1956(a)(1)(B) requires a 'knowing' mental state rather than mere recklessness or negligence." *United States v. Lora*, 895 F.2d 878, 880 n.2 (2d Cir. 1990). The District Court's opinion in *United States v. Waters*, 850 F.Supp. 1550, 1566 (N.D. Ala. 1994) also supports the conclusion that actual knowledge of the illegal origin of the funds is required in order to sustain a conviction under 18 U.S.C. § 1956(a)(1)(B). And, in *United States v. Heaps*, 39 F.3d 479, 484 (4th Cir. 1994), the Court of Appeals stated that "Section 1956(a)(1) requires the Government to prove that the defendant had 'actual subjective knowledge' that the money

used in a money laundering transaction was derived from an unlawful source."

In this case, the District Court's charge to the jury, as summarily affirmed by the Court of Appeals, permitted the jury to convict on a lesser standard. The jury was instructed that even if Petitioner was not proven to have had actual knowledge of the unlawful source of the funds, Petitioner could nevertheless be convicted if the jury found that he was willfully blind to the possibility that the funds came from some form of unlawful activity. This charge was tantamount to an instruction that permitted the jury to convict on a standard of recklessness or gross negligence, rather than the standard of actual knowledge which the statute requires.

This Court should grant the Petition in order to review this issue for several reasons.

1. The decision below is manifestly inconsistent with the plain meaning of the statute. Moreover, the legislative history of the money laundering statute further supports the conclusion that actual knowledge is required. *See* H.R. Rep. No. 855, 99th Cong., 2d Sess. 14 (1986) (remarks of Rep. Lungren: "It is a knowing standard. . . . It is not 'should have known, might have known, a reasonable person would have known,' it is 'this person knew the source of the income.' ").

The structure of the money laundering statute itself is inconsistent with the notion that a defendant can be convicted on a standard of willful blindness, without proof of actual knowledge. A defendant does not have to know the specific illegal activity giving rise to the funds, but merely needs to have knowledge that the funds came from "some form" of unlawful activity. 18 U.S.C. § 1956(c)(1). If the willful blindness instruction is superimposed upon this statutory provision, as the District Court's charge did here, the result is to permit a defendant to be convicted based merely on proof that the defendant was aware of a "probability" that the funds came from "some form" of unlawful activity. That standard is indis-

tinguishable from recklessness or negligence, and is manifestly inconsistent with the statutory requirement of actual knowledge.

2. The Court should grant review in order to resolve a conflict among the lower courts on this issue. As set forth above, some lower courts have recognized that a conviction under Section 1956(a)(1)(B) requires proof that the defendant had actual knowledge of the unlawful source of the funds. Other lower courts have ruled consistently with the decision in this case and have approved the giving of a willful blindness instruction in prosecutions under Section 1956. *See United States v. Rodriguez*, 53 F.3d 1439 (7th Cir. 1995); *United States v. Antzoulatos*, 962 F.2d 720 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 331 (1993); *United States v. Long*, 977 F.2d 1264 (8th Cir. 1992); *United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1331 (1993).

As pointed out above, the combination of the willful blindness instruction, together with the statutory requirement that the defendant merely know that the funds were derived from "some form" of unlawful activity, yields a standard that is the equivalent of recklessness or negligence. That is inconsistent with the conclusion of several cases that "actual knowledge" is required for a conviction under Section 1956. Review should be granted in order to resolve this issue.

3. There is a strong public interest in having this Court lend clarity to the law regarding the standards for a conviction under the money laundering statute. The Sentencing Guidelines provide for extremely heavy sentences in money laundering cases, even in cases such as this where the funds were not related to narcotics trafficking. Indeed, the guideline applicable in this money laundering case yields a far more severe sentence than the guideline applicable to fraud, the criminal activity that gave rise to the funds involved in the transaction. The Sentencing Commission itself has recognized an injustice in the guidelines in this respect, and proposed

amending the guidelines in order to make the guideline for money laundering consistent with the guideline for the underlying offense, but Congress has not approved that proposed guideline amendment.

Thus, this case presents an extraordinary circumstance. Petitioner did not participate in the underlying fraud scheme or even know of its existence. Under the District Court's charge, the Government was not even required to prove that Petitioner had actual knowledge that the funds came from unlawful activity; it was sufficient that Petitioner was aware of a "probability" that the funds came from "some form" of unlawful activity. Upon being convicted on this basis, Petitioner was then subjected to a far more severe Sentencing Guideline than he would have faced had he been convicted of participating in the actual fraud scheme that gave rise to the funds.

Money laundering prosecutions have become a major component of the current Federal criminal docket. Such cases result in serious punishments, even in cases such as this where the underlying criminal activity is subject to more lenient treatment. There is a public interest in having this Court set forth clearly the legal standards governing a defendant's culpability in this important area. That is particularly true where the statute itself sets forth a mental standard inconsistent with the District Court's charge to the jury. In a related context arising under the Federal currency reporting statutes, this Court has recently emphsasized the importance of close adherence to statutory requirements. *Ratzlaf v. United States*, 114 S.Ct. 655, 659 (1994). See Point II, below. Those same reasons make this a case of public importance, and accordingly, this Court should grant review.

II. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO RESOLVE A CONFLICT AMONG THE LOWER COURTS CONCERNING THE REQUIRED MENTAL STATE IN A PROSECUTION FOR CONSPIRACY TO DEFRAUD THE UNITED STATES WITH RESPECT TO THE FAILURE TO REPORT CURRENCY TRANSACTIONS.

The indictment charged Petitioner with conspiracy to defraud the United States in violation of 18 U.S.C. § 371 by engaging in cash transactions without the filing of CTRs. The District Court charged the jury that it could find that Petitioner acted as a *de facto* financial institution and was therefore required to file CTRs. The District Court did not charge the jury, however, that it was also required to find that Petitioner knew that he constituted a financial institution under the applicable statutes and regulations; nor did the District Court charge the jury that it had to find that Petitioner knew that he had an obligation to file CTRs.

Petitioner argued below that the District Court's charge was inconsistent with this Court's recent decision in *Ratzlaf*, in which this Court held that a prosecution under the currency reporting statutes requires "proof of the defendant's knowledge of the reporting requirement and his specific intent to commit the crime." 114 S.Ct. at 659-660. Thus, under *Ratzlaf* it was an essential element of the offense that defendant *knew* that he constituted a financial institution under the applicable statute and regulations, that he *knew* that he had an obligation to file CTRs, and that he deliberately violated the law. *See also United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984); *United States v. Granda*, 565 F.2d 922, 926 (5th Cir. 1978).

The Government argued in opposition that *Ratzlaf* did not apply because Petitioner was not technically prosecuted under the currency reporting statutes, but rather, was convicted of

conspiring to defraud the United States in violation of 18 U.S.C. § 371. The District Court agreed with this position (App. 5a), and the Court of Appeals summarily affirmed.

The question of whether the *Ratzlaf* rule applies in a prosecution for conspiracy to defraud the United States under Section 371, as opposed to a prosecution under the currency reporting statutes themselves, has been the subject of conflicting lower court decisions. The United States Courts of Appeals for the Second and Fourth Circuits have held that the same mental element applies in a conspiracy to defraud prosecution under Section 371 as in a prosecution under the currency reporting statutes. *United States v. Nersesian*, 824 F.2d 1294, 1314 (2d Cir.), *cert. denied*, 484 U.S. 958 (1987); *United States v. Winfield*, 997 F.2d 1076, 1082-1083 (4th Cir. 1993). Earlier decisions by the Eleventh Circuit had also reached the same conclusion. *Eisenstein*, 731 F.2d at 1542; *United States v. Hernando Ospina*, 798 F.2d 1570, 1580 (11th Cir. 1986). That conclusion is consistent with the general rule that the required mental state in a conspiracy prosecution is the same as that for the substantive offense. *United States v. Rosenblatt*, 554 F.2d 36, 42 (2d Cir. 1977).

The United States Court of Appeals for the Seventh Circuit has adopted a different rule. The Seventh Circuit has held that *Ratzlaf's* requirement that the Government must prove the defendant's knowledge of the reporting requirement and his specific intent to violate it does not apply in a prosecution for conspiracy to defraud the United States under 18 U.S.C. § 371. *United States v. Brown*, 31 F.3d 484, 489 n.5 (7th Cir. 1994); *United States v. Jackson*, 33 F.3d 866, 871 (7th Cir. 1994).

This Court should grant the Petition in order to resolve this conflict among the Circuits. It is particularly important that the Court resolve that conflict since it involves the implementation of this Court's recent decision in *Ratzlaf*. For the reasons discussed above, clarity in the law is important in the

area of money laundering and currency reporting, given the complexity of the statutes and regulations, the large number of prosecutions, and the severity of the punishments. As such, this case is one of public importance meriting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: December 15, 1995
New York, N.Y.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3319

D.C. Docket No. 93-296-CR-T-24B

Filed September 20, 1995

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—versus—

STANLEY R. STERN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

Before CARNES, *Circuit Judge,*
DYER and GARTH*, *Senior Circuit Judges.*

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* Honorable Leonard I. Garth, Senior Circuit Judge for the Third Circuit, sitting by designation.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 93-296-Cr-T-24(B)

UNITED STATES OF AMERICA

—vs.—

STANLEY R. STERN

ORDER

THIS CAUSE is before the Court on defendant's Motion for Bail Pending Appeal (Doc. No. 58). The government filed a response—United States' Response in Opposition to Defendant's Emergency Motion for Release on Bond Pending Appeal (Doc. No 60). A hearing on the motion was held on Wednesday, November 23, 1994.

On April 18, 1994, a jury found the defendant guilty of Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371 and Money Laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). On October 14, 1994, defendant Stanley Stern was sentenced to sixty (60) months in the Bureau of Prisons as to Count One and sixty (60) months as to Count Two of the indictment to run concurrent followed by thirty-six (36) months of supervised release to run concurrent. The defendant has remained at liberty on bail throughout the case and is to surrender himself at the institution designated by the Bureau of Prisons on December 18, 1994.

The Bail Reform Act 18 U.S.C. § 3143(b) presumes the defendant should be detained after conviction. The conviction is presumed correct and the burden is on the convicted defendant to overcome that presumption. *United States v. Giancola*, 754 F.2d 898, 900, 901 (11th Cir. 1985), *cert. denied*, 479 U.S. 1018 (1986).

The Court must find the following four factors in order to grant bail pending appeal:

1. that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released;
2. that the appeal is not for purpose of delay;
3. that the appeal raises a substantial question of law or fact; and
4. that if that substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.

United States v. Giancola, 754 F.2d at 901, 18 U.S.C. § 3143(b). The burden of establishing those factors is on the convicted defendant. *Giancola* at 901.

RISK OF FLIGHT AND DANGER TO THE COMMUNITY

The Court finds the defendant is not a risk of flight and not a danger to the community and on this factor alone he would be entitled to bail. He has appeared at all hearings before the Court. He has significant ties to his community. He has resigned his membership in the New York Bar and divested himself of his law practice.

SUBSTANTIAL QUESTION OF LAW OR FACT

In addition to not being a risk of flight or danger to the community, the Court must find that there is a substantial question of law or fact which if determined favorably is likely

to result in a reversal or order for a new trial on both counts. The defendant suggests there are three substantial issues to be raised on appeal.

1. The jury was not instructed that in order to return a guilty verdict it had to find beyond a reasonable doubt that Stern knew he was a "financial institution" and knew he was required to file a CTR.
2. The willful blindness doctrine was not applicable to this case.
3. Testimony concerning New York ethical requirements governing lawyers handling trust accounts should not have been allowed.

STERN AS A FINANCIAL INSTITUTION

The defendant was charged with conspiracy to defraud the United States, to impede and impair the lawful performance of the IRS in its duties; to wit: the collection of information on CTR's regarding currency transactions with financial institutions and people acting as financial institutions and further conducting and attempting to conduct a financial transaction with the proceeds of specified unlawful activity knowing said proceeds were from some unlawful activity with the intent to conceal the nature, location, source, ownership and control of the proceeds. The evidence supports a jury verdict that the defendant knew he was acting as a financial institution and subject to reporting requirements and did not want or intend for the IRS to be notified regarding the transactions. Should the appellate court find there was not sufficient proof defendant knew he was acting as a financial institution and subject to reporting requirements, that finding should not result in reversal since the jury could have found the defendant guilty of Count One in that he defrauded the United States by laundering money.

The jury was instructed that it is not necessary for the government to prove the defendant conspired to commit both but the jury had to agree unanimously upon which of the two

offenses the defendant conspired to commit. The defendant did not object to the instruction at trial.

WILLFUL BLINDNESS

The evidence justified the giving of a willful blindness instruction in this case. However, even the case relied on by the defendant for the proposition that the willful blindness doctrine should not be applied routinely in all cases, *United States v. Stone*, 9 F.3d 934 (11th Cir. 1993) found the giving of the instruction to be harmless.

TESTIMONY ON ETHICAL RULES INVOLVING TRUST ACCOUNTS

The Court twice instructed the jury on how it was to consider the expert testimony on New York Rules governing attorney trust accounts. The Court does not believe admission of such testimony improper in light of the cautionary instruction.

The Court finds the arguments of the defendant do not raise a substantial question of law or fact which if determined favorably are likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.

ACCORDINGLY it is ORDERED:

That defendant's Motion for Bail Pending Appeal is **denied.**

DONE and Ordered at Tampa, Florida this 25 day of November, 1994.

/s/ SUSAN C. BUCKLEW
SUSAN C. BUCKLEW
United States District Judge

Copies to:

Stuart E. Abrams, Esq.
David R. Jennings, Assistant U.S. Attorney

Supreme Court, U.S.
FILED
APR 10 1996
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(2)

No. 95-965

In the Supreme Court of the United States

OCTOBER TERM, 1995

STANLEY R. STERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether proof of willful blindness is sufficient to establish the element of knowledge in a money laundering prosecution under 18 U.S.C. 1956(a)(1)(B)(i).

2. Whether, in a prosecution under 18 U.S.C. 371 for conspiracy to defraud the United States by impeding and impairing the Internal Revenue Service in the collection of information regarding currency transactions reports, the government must prove that the defendant had the mens rea necessary to establish an independent criminal violation of the currency transaction reporting requirements.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-965

STANLEY R. STERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1995. The petition for a writ of certiorari was filed on December 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to defraud

the United States and to commit money laundering, in violation of 18 U.S.C. 371, and one count of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). He was sentenced to 60 months' imprisonment, to be followed by three years' supervised release, and was ordered to pay restitution of $662,000. Pet. 3-5. The court of appeals affirmed.

1. Petitioner, a licensed attorney, participated in a scheme to defraud Harold Heye, a Florida businessman, out of large amounts of money, and at the same time to defraud the United States. Between April and October 1987, petitioner's co-conspirators swindled $900,000 from Heye, having falsely represented to him that they would invest his funds in various overseas ventures. In May 1988, they convinced Heye to "invest" a further $350,000. The conspirators needed a means to distribute Heye's money amongst themselves without having the transactions reported to the government as required by law.[1] Accordingly, one of the conspirators (Anthony DiStefano, whom petitioner had represented in a bankruptcy proceeding) asked petitioner whether he would cash checks for a third party. Petitioner said that he would, for a fee. Petitioner then gave DiStefano the number of a New York bank account that petitioner's law firm used for funds held in escrow. Gov't C.A. Br. 4-6.

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[1] Whenever a financial institution receives or distributes in excess of $10,000 in cash in a single transaction, the institution must file a Currency Transaction Report (CTR) with the Internal Revenue Service (IRS). 31 U.S.C. 5313(a); 31 C.F.R. 103.22. Willful violation of that requirement is a crime punishable by a fine of not more than $250,000 or imprisonment for not more than five years, or both. 31 U.S.C. 5322(a).

On May 6, 1988, the conspirators instructed Heye to wire-transfer $100,000 to petitioner's escrow account. Petitioner transferred $99,000 of that $100,000 to a bank account in the name of Melvyn M. Molava, in Orlando, Florida, and kept the remaining $1,000 as a 1% commission for his services. Petitioner's records reflect that the transaction was conducted on behalf of his bankrupt client, DiStefano. Gov't C.A. Br. 6-7.

Molava, an acquaintance of the conspirators and a citizen of England, had opened the Orlando bank account only days before. He withdrew $95,000 of the $99,000 from the account, which the conspirators split amongst themselves. By using Molava, the conspirators assured that all paperwork, including CTRs, would be completed in Molava's name. Gov't C.A. Br. 7.

On May 10, 1988, Heye wire-transferred the remaining $250,000 to petitioner's escrow account. Petitioner then wrote a check to himself for $250,000 and deposited the check into his personal bank account. Five days later, he transferred the $250,000 from his personal account to a different escrow account in his firm's name, and from there transferred $247,500 to Molava's bank account, retaining $2500 as his 1% commission. Gov't C.A. Br. 8.

When Molava's bank refused to permit him to withdraw the newly transferred funds, the $247,500 was transferred back to petitioner's escrow account. Petitioner credited the returned funds to DiStefano's bankruptcy matter. He then agreed, for a more generous fee, to liquidate the account and distribute the funds to the conspirators in cash. Gov't C.A. Br. 8.

To obtain the necessary currency, petitioner enlisted the aid of New York businessman Abraham Markowitz. In exchange for $250,000 in cash, petitioner wrote checks totalling $257,500 on his trust account to Markowitz and to various entities associated with Markowitz. After deducting his commission and $7500 to cover the payment to Markowitz, petitioner dispensed the cash to the conspirators. Gov't C.A. Br. 8-9.

On October 19, 1988, the conspirators convinced Heye to wire-transfer an additional $312,000 to petitioner's escrow account, again purportedly as an overseas investment. Petitioner then wrote checks on the escrow account totalling $210,080 to Markowitz and several entities designated by Markowitz, and disbursed the currency he received in return to the conspirators. Gov't C.A. Br. 9-10.

Petitioner did not file a CTR with respect to any of the transactions, and he never inquired about the source of the money. Petitioner confided to an FBI agent, however, that he thought he had been dealing with drug money. Gov't C.A. Br. 10.

2. Petitioner argued on appeal that the district court should have instructed the jury that he could not be convicted on the conspiracy charge unless the jury found that he knew that he was acting as a financial institution within the meaning of 31 U.S.C. 5313(a) and that he willfully violated currency transaction reporting requirements. Gov't C.A. Br. 15. Petitioner had not requested any such instruction from the district court. *Id.* at 10.

Petitioner also argued on appeal that the district court erred in instructing the jury on the substantive money laundering count. The court had informed the jury that, to convict, it must conclude that petitioner

"acted with knowledge that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity." R7-158. Petitioner objected to the court's further instruction that the jury could find the requisite knowledge if it concluded that petitioner was aware of a high probability that the funds were proceeds of unlawful activity and willfully blinded himself to the nature of their origin. Gov't C.A. Br. 22.[2] The court of appeals affirmed petitioner's convictions on both counts without comment. Pet. App. 1a-2a.

ARGUMENT

1. Petitioner argues (Pet. 6-9) that, in affirming the district court's use of a "willful blindness" instruction in his money laundering prosecution, the court of appeals erroneously failed to require a finding of knowledge. Section 1956(a)(1)(B)(i) of Title 18 does require proof of knowledge, rather than mere recklessness or negligence. See *United States* v. *Lora*, 895 F.2d 878, 880 n.2 (2d Cir. 1990). "It is well settled," however, "that willful blindness or conscious avoidance is the legal equivalent to knowledge," *United States* v. *Antzoulatos*, 962 F.2d 720, 724 (7th Cir.), cert. denied, 506 U.S. 919 (1992).

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[2] Petitioner also argued on appeal that the district court (i) abused its discretion by admitting testimony regarding New York State Bar requirements concerning the maintenance of escrow accounts (see Pet. C.A. Br. 37-39) and (ii) erred in determining, for sentencing purposes, that petitioner used a special skill in the commission of the offense and obstructed justice (see *id.* at 39-41). The court of appeals rejected those arguments and petitioner does not challenge that aspect of the court's decision.

The purpose of a willful blindness charge "is to alert the jury that the avoidance of knowledge of particular facts may circumstantially show that the avoidance was motivated by sufficient guilty knowledge to satisfy the specific criminal statute." *United States* v. *Ochoa-Fabian*, 935 F.2d 1139, 1141 (10th Cir. 1991), cert. denied, 503 U.S. 961 (1992). See *United States* v. *Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991) ("The willful blindness instruction allows the jury to impute the element of knowledge to the defendant."); *United States* v. *Ramsey*, 785 F.2d 184, 190 (7th Cir.) ("[A] person who has enough knowledge to prompt an investigation and then avoids further knowledge really does 'know' all that the law requires."), cert. denied, 476 U.S. 1186 (1986).

The law makes no distinction between deliberate ignorance and actual knowledge. Thus, the regional courts of appeals have uniformly held that a willful blindness instruction may be given where actual knowledge is an element of an offense, so long as the record supports an inference that the defendant was subjectively aware of a high probability of the existence of the operative facts and consciously avoided obtaining further knowledge. See *United States* v. *Cincotta*, 689 F.2d 238, 243 n.2 (1st Cir.), cert. denied, 459 U.S. 991 (1982); *United States* v. *MacKenzie*, 777 F.2d 811, 818-819 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986); *United States* v. *Caminos*, 770 F.2d 361, 366 (3d Cir. 1985); *United States* v. *Whittington*, 26 F.3d 456, 461-462 (4th Cir. 1994); *United States* v. *Fierro*, 38 F.3d 761, 772 (5th Cir. 1994), cert. denied, 115 S. Ct. 1431 (1995); *United States* v. *Warshawsky*, 20 F.3d 204, 210-211 (6th Cir. 1994); *Ramsey*, 785 F.2d at 189; *United States* v. *Jensen*, 69 F.3d 906, 912 (8th Cir. 1995); *United States* v. *Jewell*, 532 F.2d 697 (9th

Cir.) (en banc), cert. denied, 426 U.S. 951 (1976); *Ochoa-Fabian*, 935 F.2d at 1141-1142; *United States* v. *Adair*, 951 F.2d 316, 319 (11th Cir. 1992).

There is no reason to treat the "knowledge" element in Section 1956(a)(1)(B)(i) any differently. Indeed, the legislative history of Section 1956(a)(1)(B)(i) shows that Congress specifically contemplated proof of knowledge through evidence of willful blindness. The Senate Report explained that "[t]he 'knowing' scienter requirements are intended to be construed, like existing 'knowing' scienter requirements, to include instances of 'willful blindness.'" S. Rep. No. 433, 99th Cong., 2d Sess. 9-10 (1986).

Moreover, the district court's willful blindness instruction in this case expressly forbade the jury from convicting petitioner upon a lesser standard than knowledge: "I must emphasize, however, that the requisite proof of knowledge on the part of [the] Defendant cannot be established by merely demonstrating that he was negligent, careless or foolish." (R7-162-163).[3] Accordingly, there is no basis for peti-

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[3] The complete instruction reads as follows:

> [W]ith respect to the issue of the Defendant's knowledge in this case if you find from all of the evidence beyond a reasonable doubt that the Defendant believed that the money sent to his escrow accounts was the proceeds of some unlawful activity, and deliberately and consciously tried to avoid learning that fact in order to be able to say, if he should be apprehended, that he did not know that the proceeds were from some unlawful activity, you may treat such deliberate avoidance of positive knowledge as the equivalent of knowledge.
>
> In other words, you may find that a Defendant acted knowingly if you find beyond a reasonable doubt either: One, that the Defendant actually knew that the money sent

tioner's assertion that the district court failed to instruct the jury regarding the governments' burden to establish knowledge.

Finally, contrary to petitioner's assertion (Pet. 8-9), the court of appeals' approval of the district court's willful blindness instruction does not conflict with any decision of any other court of appeals. The courts of appeals in *United States* v. *Heaps*, 39 F.3d 479, 484 (4th Cir. 1994), and *United States* v. *Lora*, 895 F.2d at 880 n.2—like the district court below—correctly required proof of knowledge, rather than mere recklessness or negligence. Neither case addressed whether proof of willful blindness is sufficient to establish knowledge.

2. Petitioner also argues (Pet. 10-12) that the district court improperly instructed the jury on the required mental state for a conviction of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. According to petitioner, because a conviction for violating the currency transaction reporting requirements, under 31 U.S.C. 5322(a), requires proof that the defendant knew that his conduct was illegal (see *Ratzlaf* v. *United States*, 114 S. Ct. 655 (1994)), when a conspiracy to defraud charge is based on an agreement to impede the IRS's collection of information regarding CTRs, the government must establish

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to his escrow accounts was the proceeds of some unlawful activity, or, two, that he deliberately closed his eyes to what he had every reason to believe was the fact.

I must emphasize, however, that the requisite proof of knowledge on the part of the Defendant cannot be established by merely demonstrating that he was negligent, careless or foolish.

R7-162-163.

that petitioner knew that he had an obligation to file CTRs and that he deliberately violated the law. Petitioner did not raise that argument at trial, Gov't C.A. Br. 10, and he is therefore entitled to relief only if the district court plainly erred. See Fed. R. Crim. P. 30, 52(b).

a. Petitioner was charged under 18 U.S.C. 371 (1988), which provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

As the text makes clear, conspiracy to defraud the United States is a separate and distinct crime from conspiracy to commit an offense against the United States. See *United States* v. *Jackson*, 33 F.3d 866, 870-871 (7th Cir. 1994), cert. denied, 115 S. Ct. 1316 (1995). Conspiracy to commit an offense against the United States requires proof of "at least the degree of criminal intent necessary for the substantive offense itself." *United States* v. *Feola*, 420 U.S. 671, 685-686 (1975). Conspiracy to defraud the United States, on the other hand, requires proof only that the defendant agreed to interfere with or obstruct a lawful function of government by deceit, craft, trickery, or dishonest means and that an overt act was committed by one of the conspirators in furtherance of the conspiracy. See *Jackson*, 33 F.3d at 872.

Petitioner was not charged with conspiracy to violate the CTR filing requirement. Rather, he was

charged with conspiracy to defraud the United States *by* "impeding and impairing the IRS in the lawful performance of its duties; to wit: the collection of information on CTRs regarding currency transactions with financial institutions and people acting as financial institutions." Indictment, Count 1.[4] As the Seventh Circuit noted in *Jackson*, 33 F.3d at 871, "*Ratzlaf*'s holding concerning the meaning of 'willfully violating' in the [currency transaction reporting] laws * * * has no bearing on" petitioner's conviction under the conspiracy-to-defraud clause of Section 371, which has no such language.

Petitioner's failure to file CTRs for the currency transactions in this case was one means of carrying out the conspiracy, but it was not the only means alleged by the government and, under settled principles of conspiracy law, the means alleged did not have to constitute crimes in and of themselves. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946). Other means of accomplishing the objectives of the conspiracy in this case included petitioner's failure to maintain required records relating to the financial transactions; the opening of a bank account in the name of Melvyn M. Molava, a citizen of England, so that all paperwork, including CTRs, would be in Molava's name; petitioner's obtaining of currency in a manner that enabled the conspirators to avoid transactions with legitimate financial institutions; petitioner's writing of checks to charitable entities

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[4] Count 1 also charged petitioner with conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i).

and others, utilizing the victim's funds; and petitioner's causing currency transactions to be conducted at his law offices to provide the other conspirators with untraceable currency. Indictment, Count 1. Regardless whether the conduct contemplated by petitioner and his co-conspirators otherwise constituted crimes, the agreement to engage in the above activities established a violation of Section 371 so long as the conspirators' intention was to defraud the IRS. No other mental state was required.

b. Contrary to petitioner's assertion (Pet. 11), it is not clear that any other court of appeals would have decided this case differently. The Eleventh Circuit's affirmance of petitioner's conspiracy conviction accords with the decision of the Seventh Circuit in *Jackson* and with the views of the Second Circuit, as recently clarified in *United States* v. *Wapnick*, 60 F.3d 948, 953 (1995) (embracing the reasoning in *Jackson*), petition for cert. pending, No. 95-1103. And, contrary to petitioner's assertion (Pet. 11), it is as yet unclear what position the Fourth Circuit would take on the issue presented here. In *United States* v. *Winfield*, 997 F.2d 1076, 1080-1081 (4th Cir. 1993), the defendants were indicted for conspiracy to commit the substantive offense of structuring transactions to avoid the CTR requirements, but the relevant count of the indictment was captioned "Conspiracy to Defraud." The judge instructed the jury that the defendants were charged with conspiracy "to defraud the United States in violation of 18 U.S.C. § 371 by conspiring to obstruct the CTR filing requirement of 31 U.S.C. §§ 5322 and 5324," and the court of appeals ostensibly set out to review the sufficiency of the evidence in support of that theory. *Id.* at 1081. The court correctly stated that conspiracy-to-defraud

requires only proof of an "intent to defraud the United States" (*id.* at 1082); the court also stated that "to be convicted of conspiracy to structure transactions to avoid CTR requirements, a party must have knowledge of the reporting requirements and act[] to avoid them," *ibid.* (internal quotation marks omitted), indicating that the court may have viewed the charge as embracing both a conspiracy to defraud the United States and a conspiracy to violate the CTR reporting requirements. The court analyzed the challenge brought by the first of the two defendants by reviewing the sufficiency of the "prosecution's evidence of a *conspiracy to obstruct the CTR requirements*." *Ibid.* (emphasis added). When the court reviewed the sufficiency of the evidence with respect to the second defendant, it looked to "[t]he evidence connecting [the second defendant] to a *conspiracy to defraud the government by obstructing the filing of CTR's*," *id.* at 1083 (emphasis added), but then twice described the charge against that defendant as "*conspiracy to violate the CTR requirements*," *ibid.* (emphasis added). *Winfield* has never been cited by the Fourth Circuit for any proposition. In light of the confusion evident in the opinion regarding the nature of the charges analyzed by the court of appeals, it is too early to tell whether the position of the Fourth Circuit conflicts with that taken by the Second, Seventh, and Eleventh Circuits.

The Third Circuit recently reversed a conspiracy conviction in light of *Ratzlaf*, but in circumstances that differ from those in this case. See *United States* v. *Alston*, No. 94-2195, 1996 WL 79826 (Feb. 26, 1996). Alston had been charged in one count with conspiracy to defraud the United States and the Department of the Treasury, and conspiracy to structure

transactions with the purpose of evading the CTR reporting requirements, in violation of 18 U.S.C. 371. In a separate count, he was charged with the substantive offense of structuring, in violation of 31 U.S.C. 5324 and 5322. Slip op. 2. Insofar as the conspiracy to defraud was concerned, the indictment "allege[d] no more than a conspiracy to defraud the United States by structuring," *ibid.*, and "the government offered the same body of evidence * * * to support both the charge against Alston for 'conspiracy to defraud' and the charge against him for 'conspiracy to structure,'" *id.* at 13. In those circumstances, the Third Circuit held that, "to obtain a conviction under either the 'defraud' or 'offense' clause of § 371, the government had to prove that Alston knew that his structuring activities were illegal." *Id.* at 14.

The Third Circuit was careful, however, "not [to] foreclose the possibility of convicting a defendant under § 371's 'defraud' clause based on charges *in addition to* or *different from* * * * acts of structuring." *Alston*, slip op. 14. It distinguished "cases that have upheld convictions for conspiracy to defraud under § 371 [and that] have all involved additional charges in the indictment and additional evidence produced at trial, over and beyond that required for a conviction for * * * structuring." *Ibid.* In particular, the *Alston* court distinguished *Jackson*, *inter alia*, on the ground that *Jackson* "involved extensive 'other evidence' beyond structuring activity demonstrating a conspiracy to defraud the United States." *Id.* at 15. This case is distinguishable from *Alston* on the same grounds. The indictment against petitioner alleged, and the evidence showed, that petitioner and his co-conspirators sought to defraud the United

States in many ways in addition to petitioner's failure to file CTRs. See pages 10-11, *supra*. It is therefore unlikely that the result in this case would have been any different had it arisen in the Third Circuit.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioner's claim that the decision in this case conflicts with the Eleventh Circuit's earlier decisions in *United States* v. *Hernando Ospina*, 798 F.2d 1570 (1986), and *United States* v. *Eisenstein*, 731 F.2d 1540 (1984), merits no further review. This Court does not grant certiorari to resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the court in *Hernando Ospina* did not rule on the mental state necessary to sustain a conviction for conspiracy to defraud; and, while the court in *Eisenstein* did reverse both substantive currency reporting requirement convictions *and* associated conspiracy to defraud convictions because of the district court's erroneous exclusion of evidence relevant to the defendants' knowledge of the currency reporting requirements, the *Eisenstein* court did not specifically focus on whether proof of willfulness was required to sustain the conspiracy to defraud convictions.